No. 97-1610

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN THE MATTER OF BUNKER GROUP INC.,
BUNKER GROUP PUERTO RICO, INC.,
NEW ENGLAND MARINE SERVICES, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS COMMONWEALTH OF PUERTO RICO, *et al.*

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PARTIES TO THE PROCEEDING

The petition also should have included the Commonwealth of Puerto Rico as a party. The Commonwealth of Puerto Rico appears on its own behalf, and as Public Trustee and as *parens patriae* for the Citizens of the Commonwealth, the Board on Environmental Quality of the Commonwealth of Puerto Rico, the Department of Natural Resources of the Commonwealth of Puerto Rico and the Puerto Rico Tourism Company.

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REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT HAS "SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS" AS TO WARRANT A GRANT OF CERTIORARI.

Petitioners Bunker Group Inc., Bunker Group Puerto Rico, Inc., and New England Marine Services, Inc. (collectively "Bunker Group") urge this Court to grant a writ of certiorari under Supreme Court Rule 10(a) (Rule 10(a)) because

> a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power.

Pet. for Writ of Cert. at 3 (Pet. 3). Rule 10(a) does not provide suitable grounds for granting certiorari in this case. The courts have not misused the rules of procedure and practice, and there is no reason for this Court to exercise its supervisory powers. Historically, this Court has been reluctant to intervene in all but the most egregious violations where a court clearly exceeds the scope of its authority. *See generally* 23 James W. Moore, *et al.*, Moore's Fed. Practice, § 510.24 (3d ed. 1998). Bunker Group's petition fails to establish sufficient grounds for granting certiorari.

A. Bunker Group has failed to explain why a writ of certiorari should be granted.

Bunker Group focuses solely on the merits of its argument and never attempts to show any departure from the accepted

and usual course of judicial proceedings requiring this Court's supervision. Because Bunker Group has completely failed to show why this is one of the few cases which this Court should consider, the Court should summarily deny certiorari without considering the merits of Bunker Group's argument. Simply stated, Bunker Group does not allege any violation of major concern to the integrity of the federal judicial process. Thus, Supreme Court review is not warranted.

Years ago, Justice Frankfurter warned petitioners against arguing their case on the merits and failing to explain why certiorari was proper.

> The major recurrent vice of petitions . . . is the failure to perceive the elementary distinction between an extended argument on the merits (obviously inappropriate until the merits are before the Court) and an argument on the issue whether certiorari should or should not be granted. Only in exceptional cases is any but cursory discussion of the merits appropriate in the petition at all. . . .

Felix Frankfurter and Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 265 (1934). Justice Frankfurter explained that the brief must be "confined to argument upon the reasons relied on for allowance of the writ." *Id.* at 266.

B. Bunker Group cannot show that the courts below departed from the accepted and usual course of judicial proceedings in this case of statutory interpretation.

Bunker Group seeks to invoke the least likely basis for certiorari under the Rule 10 alternatives. The Court seldom invokes its supervisory powers as a basis for granting a writ. Justice Frankfurter's initial guidance on application of former

Rule 35(5)(b), the predecessor of current Rule 10(a),[1] explained the limited basis for granting certiorari under these conditions:

> The ratio of successful to attempted invocations for this reason is smaller than that of any other. To scores of petitions each year, any asserted error in the decision of a case, however minute and of whatever character, is such a departure "from the accepted and usual course of judicial proceedings" as to call for an exercise of the Supreme Court's power of supervision. Of course, the reason refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process. How rarely the Supreme Court regards as necessary any intervention on this ground appears from the fact that no single grant of certiorari last term was attributable to it. . . .

48 Harv. L. Rev. at 274. Certiorari should be denied because Bunker Group has not shown the manner in which the courts below have so far departed from the accepted and usual course of judicial proceedings as to create an issue of major concern to the integrity of the federal judicial process.

Historically, this Court has invoked its supervisory powers reluctantly, reserving them for only the most egregious instances of abuse or ignorance of clear directives. *See*, *e.g.*, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (certiorari granted after appellate court improperly remanded a case after removal in order to reduce overburdened federal docket); *Connor v. Coleman*, 440 U.S. 612, 622 (1979) (Marshall, J., dissenting) (three-judge panel ignored Court

1. *See* 23 James W. Moore, *et al.*, Moore's Fed. Practice, § 510 App. 01 (3d ed. 1998) (text of Supreme Court Rule 35(5) of the 1925 Rules).

directive on implementing apportionment plan) *Hickman v. Taylor*, 329 U.S. 495, 514 (1947) (certiorari granted to define the scope of the attorney work product exception to discovery); *Zahn v. International Paper Co.*, 414 U.S. 291, 292 (1973) (certiorari granted to address the application of jurisdictional amounts in controversy under class action suits); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (certiorari granted to determine whether federal service of process rules are replaced by state law); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570 (1979) (court incorrectly decided a constitutional issue before a statutory issue); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982) (certiorari granted to correct a broad and novel view of standing).

Bunker Group has not met its burden of showing the presence of any issues of a magnitude requiring the Court to exercise its supervisory powers over a lower court. Accordingly, certiorari should be denied.

C. No other compelling reasons warrant a grant of certiorari.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 348 (1991). No such reason exists in this case. Because the First Circuit is the only court of appeals which has considered the arguments raised by Bunker Group, there is no conflict among the federal circuits. In addition to the Puerto Rico district court, every district court which has considered the issue has reached the same result — that the Limitation of Shipowners Liability Act, 46 U.S.C. §§ 181-89 (Limitation Act) does not apply to claims for oil spill removal costs and damages. *See In re JAHRE SPRAY II*, 1997 A.M.C. 845, 855, 1996 WL 451315, *4 (D.N.J. 1996);

In re Odin Marine Corp., No. 96-5438, slip op. at 6 (S.D.N.Y. Aug. 7, 1997);[2] *Tug Capt. Fred Bouchard Corp. v. M/V BALSA 37*, No. 93-1321-CN-T-23B, slip op. at 2 (M.D. Fla. Oct. 22, 1996)[3]. Further, there are no important federal questions which have been decided by a state court of last resort.

Bunker Group's concerns about the lack of a concursus procedure[4] for oil pollution claims does not present an important question of federal law which has not been, but should be,

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2. This case is on appeal to the Second Circuit.

3. This case is on appeal to the Eleventh Circuit, but as noted in the Memorandum of *Amicus Curiae* filed by Bouchard Transportation Co., Inc., it may be procedurally different from the instant case. Memorandum of *Amicus Curiae* at 2.

4. The "concursus" is a procedural device established by the Limitation Act and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure (Rule F). It is somewhat like an interpleader procedure, but is unique to vessel owners. Its only purpose is to marshal the vessel owner's assets (the limitation fund) in a single court proceeding for pro rata distribution among multiple claimants. Its purpose is not to marshal the claimants. A concursus is not available if the limitation fund is adequate to pay all claims in full. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151-52, *reh'g. denied*, 354 U.S. 945 (1957).

In contrast, Congress intended for full compensation of all allowable claims under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (OPA), from either those responsible for the spill or from the National Pollution Funds Center (the Fund). No fund is deposited with any court for distribution. OPA claims not paid by the responsible party may be presented to the Fund for payment. Because no court is required to marshal and distribute a fund, concursus is inapplicable. Also, concursus is never available for responsible parties who are not vessel owners. e.g. owners and operators of facilities such as pipeline and terminals.

settled by this Court. Congress, not the judiciary branch, should address Bunker Group's concerns. In August 1996, Senator Breaux of Louisiana proposed an amendment to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 (OPA), creating a concursus procedure for an OPA claim. *See* S. 2009, 104th Cong., 1st Sess. § 106 (1996) (proposed OPA amendment to create concursus). The proposal was not enacted.

Bunker Group's issues with OPA do not rise to the high level of importance required for granting certiorari. The importance of a question presented is measured by matters of "genuine, intrinsic public significance," or where the law requires uniformity. *See generally* 42 Harv. L. Rev. at 271-272. *See also* William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L. J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."). Bunker Group simply fails to address either a need for uniformity or a question of widespread public concern.

For these reasons, Bunker Group's petition for certiorari should be denied.

II.

APPLYING THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, THE COURTS BELOW CORRECTLY CONCLUDED THAT OPA IMPLICITLY REPEALED THE LIMITATION ACT AS TO CLAIMS FOR OIL SPILL REMOVAL COSTS AND DAMAGES.

In its *de novo* review of OPA, the court of appeals concluded that OPA repealed the Limitation Act as to oil spill pollution claims in

the instant case. *In re MetLife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997); Pet. App. A1-A13, A-9. It found five OPA provisions which explicitly repealed the Limitation Act as to oil spill claims, as well as other provisions which irreconcilably conflicted with the Limitation Act. *Id.* The court recognized that where the provisions of two acts cannot be reconciled, the later act, to the extent of the conflict, constitutes an implied repeal of the earlier one. *Id.* (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936))).

The five OPA provisions recognized by the court of appeals as conflicting with the Limitation Act are codified at 33 U.S.C. § 2702(a) (section's "notwithstanding" clause suggests that OPA repealed the Limitation Act with respect to oil spill removal costs and damages), 33 U.S.C. § 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill), 33 U.S.C. § 2718(a) (repealing the Limitation Act as to state and local statutory remedies), 33 U.S.C. § 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision), and 33 U.S.C. § 2718(c)(2) (repealing the Limitation Act as to fines and penalties). *In re MetLife*, 132 F.3d at 821; Pet. App. A-8.

When it evaluated OPA's § 2702(a) requirement that the responsible party is liable for oil spill removal costs and damages "notwithstanding any other provision or rule of law," the court of appeals followed the reasoning used by other courts interpreting similar language in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (FWPCA). Those courts held that the FWPCA's "notwithstanding" phrase precluded application of the Limitation Act to claims for FWPCA pollution removal costs. *See In re MetLife*, 132 F.3d at 821; Pet. App. A-8, (citing *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *In re Hokkaido Fisheries Co., Ltd.*, 506 F. Supp.

631, 634 (D. Alaska 1981))[5]. The court found those cases persuasive because neither OPA's language nor its legislative history suggests that OPA should be construed contrary to the settled law applicable to the FWPCA when OPA was enacted. *Id.*

While the court of appeals recognized that repeal of statutes by implication is disfavored, it found that several key provisions of the two statutes are plainly inconsistent. *Id.* at 822; Pet. App. A-9. Further, the court found OPA's legislative history consistent with its interpretation. *Id.* The court cited a provision expressly demonstrating Congress's intent for OPA to supersede the Limitation Act for oil spill removal costs and damages:

> Liability under this Act is established notwithstanding any other provision or rule of law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the act of March 3, 1851. . . .

In re MetLife, 132 F.3d at 822; Pet. App. A-10, (citing H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 101 (1990), *reprinted in* 1990 U.S.C.C.A.N. (101 Stat.) 779, 781 (Joint Explanatory Statement of the Conference Committee explaining § 2702(a))).

While concluding that OPA repealed the Limitation Act as to claims for oil spill removal costs and damages arising under

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5. The court of appeals also cited 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 376 (2d ed. 1994) ("OPA broadly supersedes the Limitation of Liability Act with respect to damages and removal costs under both federal and state law, including common law"). *Id.*

OPA, the court of appeals correctly recognized that some of the claims arising from an incident in which oil pollution occurs may remain within the scope of the Limitation Act. *In re MetLife*, 132 F.3d at 822; Pet. App. A-10. For example, maritime tort actions for injury or damages to persons or vessels remain subject to the Limitation Act. *Id.* The district court correctly reserved the limitation plaintiffs' right to seek limitation of liability for those claims subject to reduction under the Limitation Act. *In re MetLife*, 132 F.3d at 822-23; Pet. App. A-10 through A-11.

Certiorari should not be granted because the court's analysis of these issues simply has not departed from the accepted and usual course of judicial proceedings.

III.

THE COURTS BELOW CORRECTLY HELD THAT RULE F IS INAPPLICABLE TO CLAIMS FOR OIL SPILL REMOVAL COSTS AND DAMAGES.

The court of appeals also considered *de novo* Bunker Group's argument that even if OPA supersedes the Limitation Act, the concursus provisions of Rule F apply to actions under OPA independently from the Limitation Act. *In re MetLife*, 132 F.3d at 823-24; Pet. App. A-11 through A-13. The court concluded that Rule F's venue and limitation of liability requirements cannot be reconciled with OPA. *In re MetLife*, 132 F.3d at 823; Pet. App. A-11 through A-12. Similarly, the court concluded that Rule F's deadline for filing claims is also inconsistent with OPA's statute of limitations. *In re MetLife*, 132 F.3d at 823; Pet. App. A-12. The court noted that contrary to Bunker Group's contentions, OPA establishes a claims procedure. *In re MetLife* 132 F.3d at 824; Pet. App. A-13. (outlining OPA's claim procedure in 33 U.S.C. § 2713 and contrasting it with Rule F). After comparing OPA's requirements

with those of Rule F, the court concluded that the inconsistencies between the two procedures rendered Rule F inapplicable to OPA claims, even if Rule F applies in situations separate from the Limitation Act. *Id.*

Bunker Group has not shown, and cannot show, the manner in which the court's thorough analysis of the applicability of Rule F to OPA claims has departed from the accepted and usual course of judicial proceedings.

CONCLUSION

The petitioners have not shown that either the court of appeals or the district court has "so far departed from the accepted and usual course of judicial proceedings" as to warrant exercise of this Court's supervisory powers. Because they cannot do so, they have presented only their argument on the merits. The courts' interpretation of OPA does not create a conflict among circuit courts of appeals or state courts concerning the meaning of provisions of federal law, or any other basis for granting certiorari. If the petitioners seek to have OPA changed, they should petition Congress for relief. Certiorari should not be granted.

Respectfully submitted,

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